

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA,	:	CRIMINAL ACTION
	:	
v.	:	NO. 95-412
	:	
HERBERT R. HILL, JR.,	:	CIVIL ACTION
Defendant.	:	
	:	NO. 05-921
	:	

MEMORANDUM & ORDER

YOHN, J.

May ____, 2005

Defendant Herbert Hill, a prisoner at the Federal Correctional Institution in Beaumont, Texas, brings this *pro se* motion to amend his prior motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. For the reasons set forth below, I will deny the motion.

I. BACKGROUND

On September 12, 1995, defendant pled guilty in this court to one count of bank robbery in violation of 18 U.S.C. § 2113(a). On December 13, 1995, I sentenced defendant to 151 months imprisonment pursuant to the Federal Sentencing Guidelines. (N.T. Sentencing, Dec. 13, 1995, at 34.)

On December 9, 1996, defendant filed a *pro se* motion to vacate, set aside, or correct his sentence pursuant to 18 U.S.C. § 2255.¹ After appointing counsel and holding an evidentiary hearing,² the court denied the motion on the merits on November 10, 1997. *See Hill v. United*

¹Defendant did not file a direct appeal of his sentence.

²After the court appointed counsel, defendant filed an amended § 2255 motion on May 15, 1997. At the evidentiary hearing, defendant withdrew his *pro se* motion, leaving the court to decide his amended motion.

States, No. 95-412, 1997 U.S. Dist. LEXIS 18482 (E.D. Pa. Nov. 10, 1997). On December 3, 1997, defendant sought a certificate of appealability. I denied defendant's request on January 6, 1998, and the Third Circuit did the same on April 21, 1998. Beginning on January 15, 1999, defendant attempted to file a series of successive motions attacking his sentence.³ All of these motion were denied.

Then, on December 14, 2004, defendant filed a *pro se* motion to amend or correct his sentence in light of the Supreme Court's decision in *Blakely v. Washington*,⁴ 124 S. Ct. 2531 (2004). On December 17, 2004, I denied defendant's motion without prejudice because the Supreme Court had not yet decided whether *Blakely's* reasoning applied to the Federal Sentencing Guidelines, which I used to fashion defendant's sentence. On January 12, 2005, in *United States v. Booker*, 125 S. Ct. 738, 746, the Supreme Court concluded that "the Sixth Amendment as construed in *Blakely* does apply to the [Federal] Sentencing Guidelines." Next, on February 28, 2005, defendant filed the instant *pro se* motion to amend his prior § 2255 motion under Federal Rule of Civil Procedure 15. He contends that his Sixth Amendment rights were

³On January 15, 1999, defendant attempted to file a second *pro se* motion to vacate, set aside, or correct his sentence under § 2255. The court referred defendant's motion to the Third Circuit because under 28 U.S.C. § 2244(b)(3)(A) defendants seeking to present a second or successive § 2255 motion in district court must first file for authorization to do so in the appropriate court of appeals. The Third Circuit denied defendant's application to file a second § 2255 motion on March 25, 1999. Next, on April 10, 2000, defendant filed a *pro se* petition for writ of error *coram nobis*, which was denied on August 10, 2000. On January 30, 2001, defendant filed a *pro se* motion to suspend or set aside his sentence, which was denied the same day. On June 29, 2001, defendant filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2241, which the court dismissed on October 17, 2001.

⁴In this now familiar decision, the Court struck down certain applications of Washington State's sentencing scheme because it allowed judges to enhance a defendant's sentence on the basis of facts not found by a jury, which violated the defendant's Sixth Amendment right to trial by jury. 124 S. Ct. 2531, 2537–38

violated under *Booker* because his sentence was enhanced on the basis of facts that were never proved to a jury beyond a reasonable doubt. (Mem. of Law in Supp. of Def.'s § 2255 Mot. at 4.)

II. DISCUSSION

Federal Rule of Civil Procedure 15(a)⁵ provides that after a responsive pleading has been served, a party may amend its original pleading by leave of court “when . . . justice so requires.” Under Rule 15(c), a district court may permit a defendant to amend his § 2255 motion after the expiration of the one-year statute of limitations period set forth in the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”),⁶ “as long as the petition itself was timely filed and the petitioner does not seek to add an entirely new claim or new theory of relief.” *United States v. Thomas*, 221 F.3d 430, 436 (3d Cir. 2000). However, the discretion to permit amendment “is no longer applicable once judgment has been entered.” *Ahmed v. Dragovich*, 297 F.3d 201, 207–08 (3d Cir. 2002). Under AEDPA, “a prisoner receives one complete round of litigation, which as in other civil suits includes the opportunity to amend a pleading *before judgment*.” *Johnson v. United States*, 196 F.3d 802, 805 (7th Cir. 1999) (emphasis added); *see also United States v. Thomas*, 221 F.3d 430, 436 (3d Cir. 2000) (“A § 2255 petition provides a federal prisoner the opportunity to seek one full collateral review of his or her conviction and sentence.”).

Here, defendant seeks to amend his prior § 2255 motion even though the court issued a final judgment on the merits over seven years and a half years ago. In 1998, when the Third

⁵The Federal Rules of Civil Procedure apply to motions to amend § 2255 motions. *See United States v. Duffus*, 174 F.3d 333, 336 (3d Cir. 1999).

⁶AEDPA governs federal habeas motions like defendant's. *See Lindh v. Murphy*, 521 U.S. 320, 327 (1997).

Circuit denied defendant's request for a certificate of appealability to review this court's denial of defendant's initial § 2255 motion and defendant did not file a petition for writ of *certiorari* with the United States Supreme Court, the "one complete round of litigation" to which defendant was entitled under AEDPA came to a close. Because defendant's first § 2255 motion was fully adjudicated, I will treat the instant motion as a second or successive habeas motion and not as a Rule 15 motion to amend defendant's prior habeas motion. *See Johnson*, 196 F.3d at 805 ("Just as a second filing may be treated as an initial motion when the first was not eligible for decision on the merits, so additional filings in the first collateral attack may be treated as 'second or successive' petitions when the first has reached a final decision.").

Under AEDPA, a federal prisoner may not file a second or successive § 2255 habeas motion without first moving in the appropriate court of appeals for an order authorizing the district court to consider the motion. 28 U.S.C. §§ 2255 & 2244(b)(3); *see also In re Turner*, 267 F.3d 225, 227 (3d Cir. 2001). A prisoner may not circumvent this requirement by presenting a successive § 2255 habeas motion in the clothes of an amendment to the first. *Cf. Burris v. Parke*, 130 F.3d 782, 783–84 (7th Cir. 1997) ("Appellate courts agree that a post-judgment motion under Fed. R. Civ. P. 60(b) in the district court . . . is a 'second or successive' application for purposes of § 2244(b) . . . Otherwise the statute would be ineffectual. Instead of meeting the requirements of § 2244(b), the petitioner would restyle his request as a motion for reconsideration in the initial collateral attack and proceed as if the AEDPA did not exist."). Because defendant has failed to seek an order in the court of appeals that would allow him to

bring a successive habeas motion in district court, his motion to amend must be denied.⁷

III. CONCLUSION

For the foregoing reasons, I will deny defendant's *pro se* motion to amend his prior § 2255 motion. An appropriate order follows.

⁷Defendant should be aware that if he seeks authorization from Third Circuit to challenge his sentence under *Booker*, the court is likely to deny his request. Recently, in *In re Olopade*, No. 05-1617, 2005 U.S. App. LEXIS 5886, at *12 (3d Cir. Apr. 11, 2005), the Third Circuit denied a defendant's request for leave to file a second or successive § 2255 motion to challenge his sentence under *Booker* because the court concluded that the defendant could not make out "a 'prima facie' showing that *Booker* constitutes 'a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.'" (quoting 28 U.S.C. §§ 2244(b)(3)(C) & 2255).

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ORDER

YOHN, J.

And now on this _____ day of May 2005, upon consideration of defendant Herbert R. Hill's motion to amend his previously filed motion for relief under 28 U.S.C. § 2255 (Doc. No. 88) and the government's response thereto (Doc. No. 90), it is hereby ORDERED that the motion is DENIED without prejudice to the right of defendant to seek permission from the United States Court of Appeals for the Third Circuit to file a second or successive motion under 28 U.S.C. § 2255.

William H. Yohn, Jr., J.